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No. 80-368

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, *Petitioner*,

v.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER 8, 1980

I

QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the District of Columbia Circuit, establishing a standard for "knowing and willful" violations of the Federal Election Campaign Act ("FECA") was clearly erroneous where the standard adopted has been rejected by seven other circuits, is inconsistent with applicable decisions of this Court and with a prior decision of the District of Columbia Circuit, and is not supported by FECA's legislative history.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

FEDERAL ELECTION COMMISSION, *Petitioner*,

v.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Federal Election Commission ("the Commission") respectfully prays that a writ of certiorari issue to review the judgment rendered in this case by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

On April 1, 1980, the United States Court of Appeals for the District of Columbia Circuit reversed an order of the United States District Court for the District of Columbia imposing a $10,000 civil penalty against respondent. The order of the district court and the opinion of the court of appeals are included in the

Commission Appendix at 1a, 3a ("Comm. App. at ___").

The Commission's petition for rehearing and petition for rehearing *en banc* were denied by the court of appeals on May 27, 1980, and July 9, 1980, respectively. The court's order denying the petition for rehearing appears at Comm. App. at 14a and the denial of the petition for rehearing *en banc* at Comm. App. at 15a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1980).

STATUTES INVOLVED

2 U.S.C. § 437g(a)(5)(C)[1] provides in pertinent part:

> In any civil action instituted by the Commission . . . the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, upon a proper showing that the person involved has engaged or is about to engage in a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

[1] In an attempt to minimize confusion over citations to FECA herein, citations will be to the FECA prior to the 1979 Amendments, 2 U.S.C. § 437g(a)(5)(C) (authority for a district court to impose a civil penalty for a violation of FECA), 2 U.S.C. § 437g(a)(7) (authority for a district court to impose a civil penalty for a "knowing and willful" violation of FECA). The 1979 Amendments renumbered these provisions so that proper citation is now 2 U.S.C. § 437g(a)(6)(B), and 2 U.S.C. § 437g(a)(6)(C) respectively.

2 U.S.C. § 437g(a)(7) provides in pertinent part:

> In any civil action for relief instituted by the Commission . . . if the court determines that the Commission has established through clear and convincing proof that the person involved in such action has committed a knowing and willful violation of this Act . . . the court may impose a civil penalty of not more than the greater of (A) $10,000; or (B) an amount equal to 200 percent of the contribution or expenditure involved in such violation.[2]

STATEMENT OF THE CASE

On December 16, 1977, the Commission filed a complaint in the United States District Court for the District of Columbia charging that the AFL-CIO had violated 2 U.S.C. § 441b by transferring monies (totalling $750,000 at various times over a period of seven years) from the AFL-CIO general treasury to the AFL-CIO Committee on Political Education Political Contributions Committee ("COPE-PCC"). *See* 2 U.S.C. § 437g(a)(5)(B) (1976).

The district court found that the transfers violated 2 U.S.C. § 441b and prohibited future transfers from the general treasury to COPE-PCC. However the court denied the Commission's request that AFL-CIO be barred from re-transferring the balance of $312,000 from the general treasury to the COPE-PCC, imposing instead a civil penalty in the amount of $10,000.

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[2] Section 437g(a)(7) was amended by the Federal Election Campaign Act Amendments of 1979 to exclude the requirement of "clear and convincing proof." *See* 2 U.S.C. § 437g(a)(6)(C) (1980).

Respondents appealed only that portion of the district court's order which imposed the $10,000 penalty to the United States Court of Appeals for the District of Columbia Circuit. On April 1, 1980, the court of appeals reversed the imposition of the penalty on the ground that:

> the facts of this case do not support a finding that the violations were "knowing and willful" as required by 2 U.S.C. § 437g(a)(7), the provision upon which the district court based the imposition of the civil penalty.

Slip op. at 8; Comm. App. at 12a. Petitions for rehearing and rehearing *en banc* were denied by the court of appeals.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FOURTH, FIFTH, SIXTH, EIGHTH, NINTH AND TENTH CIRCUITS.

The standard established by the court of appeals in this case for proving "knowing and willful" violations of FECA conflicts with the knowing and willful standard applied by courts of appeals in seven other circuits.[3] Finding that "the facts of this case do not support . . . that the violations were 'knowing and willful,'" slip opinion at 9, the court of appeals held that a violation of FECA is willful only if there is evidence of

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[3] *See also* discussion of *Babcock and Wilcox Co.* v. *OSHRC*, 622 F.2d 1160 (3rd Cir. 1980), *infra* at 10.

"'defiance' or 'knowing, conscious, and deliberate flaunting' of the Act." Slip opinion at 6.

In adopting this standard, the court relied on the third circuit's ruling in *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207 (3d Cir. 1974), *aff'd en banc on other grounds*, 519 F.2d 1215 (3d Cir. 1975), *aff'd on other grounds, sub nom. Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), that:

> [w]illfulness connotes defiance or such reckless disregard of consequences to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply.

Id. at 1207. "To hold otherwise," the court noted, "would fail to distinguish between a 'serious' offense and a 'willful' one and would 'disrupt the gradations of penalties' established by Congress in [FECA]." Slip opinion at 6 *quoting Frank Irey, Jr., Inc.* v. *OSHRC*, *supra* at 1207.[4] Such reliance on *Irey*, however, stands

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[4]FECA provides penalties for violations of the Act, and more severe penalties for "knowing and willful" violations, but does not include a separate category for "serious" violations. Thus, the court's rationale that "willful" must be defined restrictively lest it overlap with the definition of a "serious violation" is not well taken. Slip opinion at 6. In addition, under 2 U.S.C. § 437g(a)(5)(D) (1976) the Commission may refer alleged "knowing and willful" violations to the Department of Justice. Since Congress provided for both civil and criminal prosecution of "knowing and willful" violations of FECA, it must have intended a lesser standard of proof for successful civil enforcement. 122 Cong. Rec. 12,199 (May 3, 1976) (Remarks of Rep. Hays) (FECA's civil sanctions apply to all violations "except for

squarely at odds with the decisions of the courts of appeals in seven other circuits[5] which have rejected the *Irey* standard. *See e.g., Intercounty Construction Co.* v. *OSHRC*, 522 F.2d 777, 779–80 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976), (fourth circuit refused to require that knowing and willful violations of OSHA include a deliberate intent to defy the Act); *National Steel and Shipbuilding Co.* v. *OSHRC*, 607 F.2d 311, 314 (9th Cir. 1979) ("We believe that the majority rule—which does not require a bad motive for willfulness—better serves the congressional objectives in enacting OSHA and better reflects the statute."); *Georgia Electric Company* v. *Marshall*, 595 F.2d 309, 319 (5th Cir. 1979) ("[W]e define a willful violation as one involving voluntary action, done either with an intentional disregard of, or plain indifference to, the requirements of the statute."); *Empire-Detroit Steel Division* v. *OSHRC*, 579 F.2d 378, 385 (6th Cir. 1978) ("We agree with the . . . opinions of the First, Fourth, and Tenth Circuits that a showing of evil or malicious

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substantial violations committed with a specific wrongful intent").

[5] Moreover, the language used in *Irey* was dicta. The case involved a foreman's good faith mistake regarding soil composition of a trench in which employees were working. If his mistaken assumption had been correct, the trench would not have required shoring against collapse. 519 F.2d at 1206–1207. The third circuit was not considering a case of intentional disobedience to a known standard. Additionally, in *Irey* itself, the court did not hold that the violation was not willful as a matter of law; it remanded the case to OSHRC for reconsideration.

intent is not necessary to establish willfulness. . . .") *Western Waterproofing Co.* v. *Marshall*, 576 F.2d 139, 142–43 (8th Cir. 1978) (court rejected application of *Irey* standard); *United States* v. *Dye Construction Co.*, 510 F.2d 78, 81 (10th Cir. 1975) (act is willful "if done knowingly and purposefully by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement."); *F.X. Messina Construction Co.* v. *OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974) ("A conscious, intentional, deliberate, voluntary decision, . . . properly is described as willful."). *See also Prino* v. *Simon*, 606 F.2d 449 (4th Cir. 1979); *Kent Nowlin Construction Co.* v. *OSHRC*, 593 F.2d 368, (10th Cir. 1979); and *Todd Shipyards Corp.* v. *Secretary of Labor*, 586 F.2d 683 (9th Cir. 1978).

In addition, courts have not required a showing of "bad purpose" or "evil motive" for willful violations of other statutes imposing civil penalties. *See Coleman* v. *Jiffy June Farms*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972) ("wilful" violation [of the Fair Labor Standards Act] occurs where the employer knows, or has reason to know, that his conduct is *governed by* the Act.); *Lewin* v. *Blumenthal*, 590 F.2d 268 (8th Cir. 1979) (plain indifference to recordkeeping requirements sufficient to establish a willful violation). *See also Fin and Feather Sport Shop, Inc.* v. *Bureau of Alcohol, Tobacco and Firearms*, 481 F. Supp. 800, 804 (D. Neb. 1979); *Shyda* v. *Director, Bureau of Alcohol, Tobacco and Firearms*, 448 F. Supp. 409, 411 (M.D. Pa. 1977).

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The court of appeals' construction of willfulness, as required to demonstrate a knowing and willful violation of FECA, does not comport with the usual meaning of "knowing and willful" or "willful" found in regulatory statutes that impose civil penalties. This Court has held that it is generally adequate to show intentional disregard of or indifference to the regulatory requirement, and that it is not necessary to establish evil intent in order to prove a knowing and willful violation of a civil statute. *United States* v. *Park*, 421 U.S. 658, 670–71 (1975); *United States* v. *Bishop*, 412 U.S. 346, 361 (1973); and *United States* v. *Illinois Central Railroad Co.*, 303 U.S. 239, 243 (1938).

In *United States* v. *Pomponio*, 429 U.S. 10 (1976) this Court held that willfulness, even in a criminal case, means only "an intentional violation of a known legal duty" and does not include any element of bad purpose or evil motive. *United States* v. *Pomponio*, *supra* at 12. The showing of willfulness in a civil case has been held to an even lower standard. *United States* v. *Illinois Central Railroad Co.*, *supra*. Any other interpretation of "knowing and willful" as it applies to violations of FECA would seriously impair the Commission's enforcement of the Act. If the court of appeals were correct, the significant penalties reserved by the Act for "knowing and willful" violations would rarely if ever be imposed, since the Commission would be forced to find evidence of "defiance" and "flaunting" on the part of a respondent to a Commis-

sion action.[6] In addition, if the Commission is required to meet this high standard before it can successfully prosecute a civil action for a serious knowing and willful violation of FECA, it cannot be determined what standard would be required before the Commission could refer a matter to the Department of Justice for criminal investigation and possible prosecution. *See* note 4 *supra*; *c.f.* 2 U.S.C. § 437g(a)(7) with § 437g(a)(5)(D) (1976). Such a standard would require the Commission to discover the motives and intent of persons engaged in political activities—a requirement which this Court should hesitate to compel. *See e.g.*, *Jones* v. *Unknown Agents of the Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9092, 50,706 (D.C. Cir. Aug. 23, 1979).

Additionally, the decision of the court in this case misconstrues and misapplies the willfulness standard as enunciated by the District of Columbia Circuit. *Cedar Construction Co.* v. *OSHRC*, 587 F.2d 1303 (D.C. Cir. 1978). There, in an attempt to reconcile the apparent differences among the circuits, the court concluded that "intentional disregard of, *or* plain indifference to, OSHA regulations could well be considered" a willful violation. *Id.* (emphasis added).

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[6] As the sixth circuit has said:

> We do not consider the phrases "bad purpose" and "an evil motive" to be appropriate in this action. [The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C.A. § 801 *et seq.*] is a Safety Act and it would be virtually impossible to establish violations if this rule were followed.

United States v. *Consolidation Coal Co.*, 504 F.2d 1330, 1385 (6th Cir. 1974), *quoted in Empire-Detroit Steel Division* v. *OSHRC*, 579 F.2d at 385.

The third circuit, having recently reconsidered the question, adopted the conclusion of the District of Columbia Circuit in *Cedar Construction, supra.* The court, after noting that its opinion in *Irey* "has not been followed in some circuits," observed:

> . . . the Court of Appeals for the District of Columbia Circuit, an ever-available forum under the statute, has concluded that there is little, if any, difference between our approach and that taken by the other courts. *Id.* at 1305. We agree.

Babcock & Wilcox Co. v. *OSHRC*, 622 F.2d at 1167 (3d Cir. 1980). Thus, even the third circuit now interprets its *Irey* standard as encompassing "plain indifference," not requiring a showing of "bad purpose."

Yet, without mentioning *Cedar Construction* and notwithstanding the "plain indifference" standard for willfulness established therein, the court of appeals in this case held that a "knowing and willful violation must be something more." Slip opinion at 5. This ruling misconstrues and misapplies a prior ruling of the District of Columbia Circuit which should not be permitted to obtain in the absence of consideration by this Court.

III. THE INTENT OF CONGRESS IN ENACTING 2 U.S.C. § 437g(a)(7) IS FRUSTRATED BY THE HOLDING OF THE COURT OF APPEALS.

FECA's legislative history indicates that Congress intended no higher standard for "knowing and willful" than that applied by the courts, *supra.* The Chairman of the House Administration Committee summarized 2 U.S.C. § 437g(a)(7):

> Perhaps the most important phrase used in the enforcement section is "knowing and willful." As explained in House Report No. 94–917, that phrase refers to actions taken with full knowledge of all the facts and a recognition that the action is prohibited by law.

122 Cong. Rec. 12,199 (May 3, 1976) (remarks of Rep. Hays) In its report accompanying H.R. 12406, the Committee on House Administration explained the purpose of the section:

> H.R. 12406 places its reliance on civil enforcement, except as to substantial violations committed with a specific wrongful intent. The bill distinguishes between violations of the law as to which there is not a specific wrongful intent which are subject to injunctive relief and civil penalties of up to $5,000 or the amount in question, whichever is greater, and violations as to which the Commission has clear and convincing proof *that the acts were committed with a knowledge of all the relevant facts and a recognition that the action is prohibited by law*, which are subject to injunctive relief and a civil penalty of up to $10,000 or twice the amount in question.

H.R. Rep. No. 94–917, 94th Cong., 2d Sess. 4 (1976) (emphasis added). Thus it is clear that Congress intended that knowing and willful FECA violations could be found absent bad purpose or motive.

The adoption by the court in this case of a much higher standard for "knowing and willful" violations stands in direct conflict with congressional intent in enacting FECA.[7] To require the Commission to meet

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[7] In any event, the district court's imposition of a civil penalty in the amount of $10,000 in this case was not based upon a find-

this higher standard in its actions would place a severe restriction on the statutory authority of the FEC to apply stronger sanctions in enforcing the law; a result the Commission urges was not intended by Congress.

ing that the violation of the Act was "knowing and willful." Neither the district court's order, nor the transcript of the hearing in the district court, indicates that the court considered the violation "knowing and willful." The court's imposition of a civil penalty in the amount of $10,000 is well within the discretionary range of civil penalties which 2 U.S.C. § 437g(a)(5)(C) provides for a violation totalling over $300,000. Indeed, the fact that "knowing and willful" was neither addressed as present in the case nor briefed as an issue in the case is supported by responses and papers filed by all parties. *See* Comm. App. at 16a; 18a; 20a. *See also* Commission's complaint filed in the United States District Court for the District of Columbia; the Commission's Motion for summary judgment; AFL-CIO's brief to the United States Court of Appeals for the District of Columbia Circuit and the Commission's brief to the court of appeals.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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SEPTEMBER 8, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 77-2147

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), DEFENDANT.

ORDER

This matter having come before the Court on Cross Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having found that there are no genuine issues as to any material facts and that the plaintiff, Federal Election Commission, is entitled to judgment as a matter of law, it is this 16th day of June, 1978, hereby

ORDERED that defendant's Motion for Summary Judgment is hereby DENIED, and it is

FURTHER ORDERED that plaintiff's Motion for Summary Judgment is hereby GRANTED, and judgment for plaintiff shall be entered as follows:

1. Defendant's transfers of money from the AFL-CIO COPE Education Fund to the AFL-CIO COPE Political Contributions Committee, a separate segregated fund, violated 2 U.S.C. § 441b.

2. Defendant is hereinafter enjoined at any time in the future from transferring any money from general treasury funds or from the AFL-CIO COPE Education Fund to the separated segregated fund of the AFL-CIO COPE Political Contributions Committee except as set forth in the single transfer ordered below.

3. Defendant shall pay a civil penalty in the amount of $10,000 pursuant to 2 U.S.C. § 437g(a)(1)(7); and it is

FURTHER ORDERED that the AFL-CIO COPE Education Fund shall transfer $312,000 to the AFL-CIO COPE Political Contributions Committee forthwith

/s/ GEORGE L. HART, JR.
United States District Judge

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1937

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), APPELLANTS

v.

FEDERAL ELECTION COMMISSION, APPELLEES

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 77-2147)

Argued October 16, 1979

Decided April 1, 1980

Laurence Gold with whom *J. Albert Wall* was on the brief, for Appellant.

Kathleen I. Perkins, Attorney, Federal Election Commission with whom *William C. Oldaker*, General Counsel, *Charles N. Steele*, Associate General Counsel and *Barbara Van Gelder*, Attorney, Federal Election Commission were on the brief, for appellees.

Before: ROBB and WALD, *Circuit Judges*, and NICHOLS*, *Judge*, United States Court of Claims

Opinion for the Court filed by *Judge* NICHOLS.

NICHOLS, *Judge:* This is an appeal by the American Federation of Labor and Council of Industrial Organizations (AFL-CIO) from an unreported order of the United States District Court for the District of Columbia issued on June 16, 1978. The AFL-CIO takes exception only to that portion of the order which assessed a civil penalty of $10,000 for violation of the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* (Act). The alleged violation involved the transferring of funds between the Committee on Political Education-Political Contributions Committee (COPE-PCC) and the COPE Education Fund. The case was taken on a joint stipulation of facts.

The COPE Education Fund is financed by AFL-CIO general treasury monies derived from union dues and assessments. It is used for non-partisan voter registration, get-out-the-vote drives and communications with union members. COPE-PCC, on the other hand, is a separate segregated fund within the meaning of 2 U.S.C. § 441b and is permitted to make direct contributions to candidates for federal elective office. Its monies may not be derived from any source but wholly voluntary political contributions from AFL-CIO union members. 2 U.S.C. § 441b allows corporations and labor unions to have such "segregated" funds sup-

*Sitting by designation pursuant to 28 U.S.C. § 293(a).

ported, in the case of unions, in no part by the required dues of members.

As had been a long-standing practice of the AFL-CIO, between 1970 and 1977 several times COPE-PCC transferred money to the COPE Education Fund for use by that fund. It was explained that COPE-PCC funds were idle and useless between elections. On demand of COPE-PCC, funds would be transferred from the Education Fund back to COPE-PCC for its use. At no time did COPE-PCC owe money to the Education Fund: the assistance was entirely one-way. These transfers were designated as loans but were interest-free. Complete records were kept, and, with one relatively minor exception, the transactions were duly reported to the Office of Federal Elections of the General Accounting Office (GAO) and later to Federal Elections Commission (FEC or Commission) to which jurisdiction was transferred. The FEC concedes that there was no intentional wrongdoing.

On November 7, 1974, the GAO issued a report of its Office of Federal Elections on the results of an audit of the AFL-CIO. The purpose of the audit was to review AFL-CIO compliance with the Act. The report noted that there had been a failure to report a transfer of $1,500 from COPE-PCC to the COPE Education Fund. The report went on to say that an amended report had been filed to correct the discrepancy and that no further action was recommended. Any reader aware that the transfer referred to was one of several would, we think, have concluded that if reported the transfers were not objectionable.

On August 23, 1977, the Federal Elections Commission, which had succeeded to the GAO's authority, notified the AFL-CIO that it was taking the position that while § 441b of the Act permits transfers of funds from COPE-PCC to the COPE Education Fund, no transfers back into COPE-PCC were permissible.

Following an FEC reaffirmance of its position, there was a period of attempted reconciliation as required by section 437g(a)(5)(A) of the Act. During this period the Commission rejected a proposed settlement which would have allowed a single transfer of $312,000 from the Education Fund to COPE-PCC for the purpose of clearing the balance between the two funds; the Education Fund holding at that time that sum of COPE-PCC funds.

The FEC brought an enforcement action in the District Court seeking a prohibition against any future transfers from the COPE Education Fund to the COPE-PCC and the imposition of a civil penalty under section 437g(a)(7) of the Act. During the hearing on June 12, 1978, it was conceded by counsel for the Commission that "* * * we are not attributing a direct mal-feasance [sic] on the part of the AFL-CIO." No express provision violated by the transfers was pointed out and the transcribed remarks of the District Judge show he thought the wrong was principally to the political contributors, not the regular dues payers, and was in the nature of a breach of trust. We agree with the District Judge that under the law no part of the monies of a union's segregated political fund should be co-mingled with regular dues money, even temporarily, but the statute is not specific as to what is to

be segregated from what. The conclusion is a matter of reading the statute in light of the common law rather than direct statement, but it is not challenged here, as it was below. The class the statute was written to protect clearly was the regular dues payers, not the political contributors, and in view of the obviousness of this, the error of the appellant, though an error, still is understandable.

At the close of the hearing, the District Court stated the terms of its order from the bench. The order was filed in final written form on June 16, 1978. It declared the transfers to be in violation of 2 U.S.C. § 441b and prohibited future transfers from the general treasury or the Education Fund to COPE-PCC with a single exception; a clearing of the $312,000 balance of COPE-PCC monies back to COPE-PCC from the Education Fund was ordered. Finally, the District Court ordered the imposition of a civil penalty of $10,000 against the AFL-CIO. As previously noted, only the imposition of the civil penalty is now at issue. We reverse.

While the transcript of the hearing reflects the civil penalty was assessed pursuant to 2 U.S.C. § 437g(a)(7), the final order cited 2 U.S.C. § 437g(a)(1)(7) which would not accurately refer to any section of the Act. We therefore take the citation in the transcript as correct.

While we agree with appellee that the District Court is vested with discretionary authority in the imposition of civil penalties, the exercise of that discretion is subject to appellate review. Such discretionary exercises must be "guided by sound legal principles." *Al-*

bemarle Paper Co., v. *Moody*, 422 U.S. 405, 416 (1975).

We turn to the question of whether the imposition of a $10,000 civil penalty under 2 U.S.C. § 437g(a)(7) is supported by the facts of this case. Under that section it must be found that there was "clear and convincing" evidence that the violation was "knowing and willful." Where such a finding is made, a civil penalty of not more than the greater $10,000 or 200 percent of the amount of money involved in the violation may be imposed. In the context of this case and the statutory framework, it is clear that a "knowing and willful" violation must be something more than is present here. As will appear, another section deals with penalties for violations not specified to be willful. The distinction is a real one the trier of fact must contend with, we think, if he means to find willfulness. The order should have addressed the question, but we do not dispose of the case on that ground as it was not briefed.

In the case of *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F.2d 1200 (1975),[1] the Third Circuit faced a similar issue where the Occupational Safety and Health Act provided for three levels of civil penalties for "non-serious," "serious," and "willful" violations. The penalty for a "non-serious" violation was a discretionary fine of up to

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[1] *reh. en banc*, 519 F.2d 1215, *cert. granted*, *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 96 S.Ct. 1458, 424 U.S. 964, 47 L.Ed.2d 731, *aff'd*, 97 S.Ct. 1261, 430 U.S. 422, 51 L.Ed.2d 464 (1977).

$1,000. For a "serious" violation a mandatory fine of up to $1,000 was provided. A "willfull' or repeated violation could bring a fine of up to $10,000. The hearing officer had found a "willful" violation in the employer's failure to adequately assess a certain safety risk. On appeal from the Commission's affirmance of the hearing officer's decision, the court decided that the hearing officer had found facts sufficient only to support a finding of a "serious" violation. Given the statutory context, a "willful" violation must necessarily connote "defiance or such reckless disregard of the consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act." To hold otherwise would fail to distinguish between a "serious" offense and a "willful" one and would "disrupt the gradations of penalties" established by Congress. *Frank Irey Jr., Inc.* at 1207.

In our case there is not only no finding but also no evidence of such "defiance" or "knowing, conscious, and deliberate flaunting" of the Act. In fact, every indication is that the AFL-CIO considered itself to be in compliance with the Act. It learned nothing to the contrary from the GAO upon the occasion of the latter's audit. The fact that the AFL-CIO was routinely reporting the inter-fund transfers to the very agency charged with enforcement of the Act is persuasive evidence of a lack of intent to violate the Act's prohibitions. The Commission would seem to have conceded this point in stating at the District Court hearing that "the Commission must reiterate we are not attributing a direct mal-feasance [sic] on the part of the AFL-CIO." Appendix at 68a.

In addition to a lack of evidence that the AFL-CIO acted otherwise than in good faith, we can not say that their belief in the legitimacy of the inter-fund transfers was unreasonable. Neither the Act nor any court decision had addressed the immediate issue. Most telling is the fact that the audit by the Office of Federal Elections of the GAO, two years after the decision in *Pipefitters Local No. 562* v. *United States*, 407 U.S. 385 (1972) had noted the transfers and did not indicate disapproval in any way. It is clear that uncertainty as to the meaning of the law can be considered in assessing the element of willfulness in a violation of the law. *See James* v. *United States*, 366 U.S. 213 (1961), *United States* v. *Garber*, 607 F.2d 92 (5th Cir. 1979) (41 U.S.L.W. 2425).

The *Garber* case was a criminal tax prosecution where, as here, willfulness was, by express command of the statute, an element of the offense. The holding (en banc, with four dissents) was that it was reversible error to exclude testimony by experts tending to show that the rightness or wrongness of defendant's reporting of the involved income was uncertain. The court said that no one should be convicted on the basis of an interpretation of law that is so written as to be of uncertain meaning to the mind of the accused. We do not have before us the question whether an uncertainty of law can be shown by witnesses. We think it is obvious that in construction of any penal statute of which willfulness is an element, it is possible for the meaning of the statute to be clear to the mind of a trained judge, and still be less than clear enough to support a finding of willful violation. This is certainly

so where, as here, the question whether the conduct of the AFL-CIO was unlawful, was hitherto untested by any sort of tribunal, and there was no regulation or even press release by the Commission, so far as cited to us.

Contrary to the Commission's assertions, we do not regard the Supreme Court's decision in *Pipefitters* as providing specific notice that the inter-fund transfers involved herein were prohibited by the Act. In that case, the appeal of a conviction for campaign violations under the law as it was before the Federal Election Campaign Act of 1971, the central issue was whether union control of political action committee (PAC) funds was prohibited. The Supreme Court rejected the prosecution's contention that PAC's must be independent of control by union officials. By way of limiting the scope of its holding, the Court stated that "a fund must be separate from the sponsoring union only in the sense that there must be strict segregation of its monies from union dues and assessments." *Pipefitters* at 414. At 422 the Court states that " 'separate' is synonymous with 'segregated.' " At 428–432 there is extensive material on the meaning of "segregated," but it deals with whether the term bars union officials paid by union dues, and using union financed offices, from managing political funds. The holding is that it does not. Some readers of *Pipefitters* might have advised caution in doing what was done here, but others might have said that, if carefully accounted for, loans by the political fund to the regular fund financed by dues were not inconsistent with the funds being "separate" and therefore not in conflict with the requirement of "segregation." The truth is that the Court did

not have before it the issue we must decide here, and the issues it did decide are not here raised.

In all events the facts of this case do not support a finding that the violations were "knowing and willful" as required by 2 U.S.C. § 437g(a)(7), the provision upon which the District Court based the imposition of the civil penalty.

As noted above, the Act also provides for the imposition of a civil penalty under section 437g(a)(5)(C). That section provides for a lesser penalty upon a finding of a violation of the Act and does not expressly require that the violation be "knowing and willful." We do not reach the question of whether a penalty could have been imposed in this case under that section. The complaint did not seek a penalty thereunder, the parties did not brief the issue, and the District Court did not consider it.

As a matter of fact, the penalty was imposed without any discussion at all; the entire oral argument before the District Judge dealing with the attempt of the Commission to remove the $312,000 permanently from the uses for which it had been donated. There was no attempt at conciliation on the Commission's part except on the inadmissible premise that the breach of trust it had discovered should not be corrected. We believe the refund of $312,000 ordered by the court was properly to be characterized as the correction of a mistake. That is what we have here, a breach of law by mistake, not by willful wrong.

Had the AFL-CIO been intransigent after learning of the Commission's position on the transfers, we might have reached a different result. In fact, the

AFL-CIO was willing during the conciliation period to accede to the Commission's position prospectively. It was the Commission's insistence on prohibiting the clearing of the balance between the funds that stymied the conciliation efforts.

Accordingly, the order of the District Court is modified by vacating the portion that assesses a penalty of $10,000. The remainder of the order is not appealed from and disposes of the case.

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action No. 77-2147

No. 78-1937

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), APPELLANTS

v.

FEDERAL ELECTION COMMISSION, APPELLEES

BEFORE: ROBB and WALD, *Circuit Judges;* and NICHOLS*, *Judge*, United States Court of Claims

ORDER

Upon consideration of appellee's (federal) petition for rehearing, it is

ORDERED, by the Court, that appellee's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to Title 28 U.S.C. § 293(a).

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action No. 77-2147

No. 78-1937

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), APPELLANTS

v.

FEDERAL ELECTION COMMISSION, APPELLEES

BEFORE: WRIGHT, *Chief Judge;* MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, and EDWARDS, *Circuit Judges*

ORDER

The suggestion for rehearing *en banc* filed by appellee (Federal Election Commission) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that appellee's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D.C. 20001

October 3, 1978

Charles N. Steele, Esquire
Lester N. Scall, Esquire
Barbara Van Gelder
Federal Election Commission
1325 K St., N.W.
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J. Albert Woll, Esquire
Laurence Gold, Esquire
815 16th St., N.W.
Washington, D.C. 20005

RE: No. 78-1937—*American Federation of Labor and Congress of Industrial Organizations v. Federal Election Commission*

Dear Counsel:

One objective of the Court's civil appeals management plan is to identify, early in the appellate process, cases which should be remanded for further proceedings. I am authorized to make inquiries of the parties, although, of course, only the court can decide whether a remand is in order.

The appeal is limited to the imposition of a civil penalty. My concern is with the adequacy of the record for appellate review of this judgment.

The district court's order is not accompanied by a memorandum with findings and conclusions. The sole

conclusion in the order is that the transfers violated 2 U.S.C. § 441b. There is no explicit determination that, as a predicate for a civil penalty, "the Commission has established through *clear and convincing* proof that the person involved in such civil action has committed a *knowing and willful violation* of this Act . . . ." 2 U.S.C. § 437g(a)(7) (emphasis added). Further it is not clear whether the papers moving for summary judgment were intended to address the penalty question, particularly, whether a "knowing and willful" violation of the Act had occurred.

In light of this, my inquiry is whether this appeal should go forward on the present record or whether there should be further consideration of the matter in the district court. This might include further development of the record or, at least, findings and conclusions on the question of willfulness. I should stress that the question has not been presented to this court, and I am raising it initially with the parties.

If you decide there is a problem of going forward on this record, then I suggest that an appropriate motion be filed. In any event, I would appreciate being informed how you propose to proceed.

Sincerely,

/s/ MICHAEL DAVIDSON
Chief Staff Counsel

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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October 19, 1978

Mr. Michael Davidson, Chief Staff Counsel
United States Court of Appeals for the
District of Columbia Circuit
United States Courthouse
Constitution Avenue & John Marshall Place
Washington, D.C. 20001

Re: American Federation of Labor and Congress of Industrial Organizations v. Federal Election Commission

Dear Mr. Davidson:

After careful consideration of the points made in your letter to counsel in the above-noted case, I remain of the view that this matter is appropriate for appellate review and should not be remanded for further proceedings.

Unfortunately for defendants, the Federal Election Campaign Act not only provides for certain civil penalties when the Commission can establish through "clear and convincing proof that the person involved in [a] civil action has committed a knowing and willful violation" (2 U.S.C. Section 437g(a)(7)), but also for lesser penalties for violations that are not knowing and willful. See 2 U.S.C. Section 437g(a)(5)(B)&(C). This is such a case and the papers moving for summary judgment were intended to address the penalty question it raises.

As you point out, the District Court did not make formal findings of fact and conclusions of law. Judge Hart did however state from the bench the basis for his decision before entering judgment. We are therefore ordering that portion of the transcript of the proceedings so that it may be included in the record appendix for the benefit of the Court of Appeals.

Very truly yours,

LAURENCE GOLD
Special Counsel

FEDERAL ELECTION COMMISSION
1325 K STREET N.W.
WASHINGTON, D.C. 20463

November 6, 1978

Mr. Michael Davidson, Chief Staff Counsel
United States Court of Appeals for the
District of Columbia Circuit
United States Courthouse
Constitution Avenue & John Marshall Place
Washington, D.C. 20001

Re: *American Federation of Labor and Congress of Industrial Organizations* v. *Federal Election Commission*

Dear Mr. Davidson:

This is to acknowledge your letter of October 3, 1978. Initially, the Commission agrees with counsel for the appellant that while the Court below did not enter formal findings of facts and conclusions of law, the Court did state from the bench the basis for its conclusions.

Moreover, while counsel for the Commission does not know what penalty questions appellant believes this case raises, the fine imposed by the Court is within the statutory limits set by 2 U.S.C. § 437g(a)(5)(B), (C) and (a)(7).

In short, it seems that there is an adequate record to sustain the Court's order of June 16, 1978. Both parties agreed that there was no genuine dispute of material fact. The facts before the lower Court establish the length and duration of the AFL-CIO's practice with regard to the matters at issue, i.e., that the

transfers of money from the Education Fund to the separate segregated fund was a "longstanding" practice and that the total amount of the violation extant was $312,000.

If you have any further questions concerning this matter, please contact, Barbara Van Gelder, (telephone # 523-4060), the attorney assigned to this case. Thank you for your interest in this matter.

Sincerely yours,

/s/ WILLIAM C. OLDAKER
General Counsel

cc: Laurence Gold

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